BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Inter-Carrier Compensation for ISP-Bound Traffic	)	CC Docket No. 99-68

Comments of GST Telecom Inc.
on the Notice of Proposed Rulemaking

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Executive Summary

In order to promptly and efficiently resolve the issue of the compensation owed for inter-carrier transport and termination of calls to ISPs, the FCC should reissue its reciprocal compensation rules making the minimum changes necessary to reflect the fact that the only difference between reciprocal compensation for the transport and termination of "local" traffic and inter-carrier compensation for calls to ISPs is the FCC's characterization of calls to ISPs as "largely interstate." Since the functionality being considered is exactly the same, the rate should be the same.

The FCC's rules should (1) continue the FCC's primary reliance on voluntary negotiations as the preferred solution, (2) build upon the work of the state commissions' TELRIC proceedings and (3) establish federal guidelines requiring symmetrical, TELRIC based rates. These rates should be either the state's current TELRIC rate for reciprocal compensation or, in the absence of such rate, the FCC default proxy rates.

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GST Telecom Inc., on behalf of itself and its subsidiaries, by and through its counsel and pursuant to Federal Communications Commission's ("FCC") rules, hereby submits its comments on the Notice of Proposed Rulemaking in the above-referenced proceeding.[1] Like many incumbent local exchange carriers ("ILECs") and competitive local exchange carriers

[1] *Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, Notice of Proposed Rulemaking (Rel. Feb. 26, 1999) ("NPRM").

("CLECs"),[2] GST provides a full range of telecommunications services to a variety of end users including Internet Service Providers ("ISPs").

Given a host of recent ILEC actions attempting to reverse many of the state commission rulings on compensation for calls to ISPs, despite the fact that they are consistent with the *ISP Inter-Carrier Compensation Order*, GST believes prompt resolution of the way in which such compensation will be established once the FCC rules are in place is essential. The ILECs have clearly adopted a policy of delaying as long as possible fulfilling their current contractual obligations and seek to avoid future obligations.

The FCC has both the opportunity and legal authority to finally resolve issues related to inter-carrier compensation for ISP-bound calls and should exercise such authority by establishing appropriate default or "backstop" rules under which parties would initially negotiate and, if necessary, arbitrate inter-carrier compensation for ISP-bound traffic. The FCC should adopt rules that are sufficiently clear as to allow the parties to negotiate pricing based on rules and guidelines with the knowledge that, if parties are unable to agree, these rules would be applied in resolving the dispute. Such an approach would be similar to the procedures adopted

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[2] GST believes that the use of the term CLEC actually mislabels the services provided by the company. GST offers a full range of integrated telecommunications services, including local, interexchange, and data transmission, to data-centric business customers. However, GST will adopt the nomenclature used in this proceeding rather than integrated communications provider ("ICP").

by the FCC for the pricing of unbundled network elements in the *Local Competition Order*.[3] In addition to a pricing regime, the FCC should ensure that inter-carrier compensation disputes can be resolved quickly by accelerated procedures at either the federal or state level.

In considering its rules, the FCC should remain mindful that while the issue of inter-carrier compensation of calls to ISPs has been extremely controversial and proper resolution is vital to the development of local competition, the source of the problem is quite specific and is readily addressable. The issue arises only because of a void in inter-carrier compensation that results from the Commission's narrow interpretation of parts of the 1996 Act and the Commission's long standing and recently reaffirmed decision not to apply access charges to ISPs. In the absence of a federal rule, most states have adopted TELRIC-like rates to compensate carriers for transport and termination of local calls, including calls to ISPs. Both "reciprocal compensation" for local call termination and "inter-carrier compensation" for calls to ISPs are intended to compensate carriers for the same function. The compensation that had been set by the states and the compensation which will be set by the FCC rules should, therefore, be the same regardless of whether these calls are deemed jurisdictionally interstate or intrastate.

Adoption of GST's recommendations will accomplish a number of FCC goals: 1) it continues the FCC's primary reliance on voluntary negotiations as the preferred solution to interconnection issues under the 1996 Act; 2) it builds upon the work the state commissions have

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[3] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15,499 15,812-929 (1996) ("Local Competition Order").

already done in this area for the past two and a half years; 3) it will reduce the number of complaints filed with state and federal regulators; 4) it will eliminate the need to create mechanisms to attempt to separate ISP-bound traffic on a jurisdictional basis; and 5) it will ensure the continued development of the Internet without the imposition of access-type charges or other unknown regulatory regimes.[4]

I. Statutory and Regulatory Background

The Telecommunications Act of 1996 requires all carriers, be they an incumbent or new entrant, to interconnect with all other carriers,[5] and requires all local exchange carriers to "establish reciprocal compensation arrangements for the transport and termination of telecommunications"[6] as part of their interconnection agreements. Section 251(g) of the Act left in place the existing access charge regime until replaced by the FCC.

Pursuant to the Act, thirty state commissions have reviewed the issue of the appropriate inter-carrier compensation for calls to ISPs in the context of arbitration or interconnection agreement complaint proceedings. In every case, the state commission determined that inter-carrier compensation is due and that calls to ISPs should be treated in the same manner as any other local call. While there are a variety of grounds on which the decisions were made, an

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4 Adoption of GST's recommendations also would comply with the FCC's statutory mandate to reduce barriers to entry by small telecommunications firms, 47 U.S.C. § 257, and reduce regulatory burdens on small businesses as required by the Regulatory Flexibility Act, 5 U.S.C. §§ 601-12.

5 47 U.S.C. § 251(a)(1).

6 47 U.S.C. § 251(b)(5).

underlying premise was that given the FCC's restrictive view of reciprocal compensation, and the continuation of the ISP access charge exemption, if the calls were deemed not to be local, no compensation would be owed on calls to ISPs. Given the FCC and the carriers' prior treatment of such traffic as local, the conclusion of state commissions was appropriate. Nonetheless, the ILECs appealed most of the state decisions. To date, every reviewing court has upheld the state commission decisions.

Given the continuing controversy, the FCC finally addressed the issue in the *Inter-Carrier Compensation Order*.[7] The FCC noted that while it was asserting jurisdiction over ISP-bound calls, that does not resolve whether CLECs are due compensation for terminating ILEC customers calls to ISPs. Rather, the FCC specifically determined that it was entirely reasonable for parties, or the states that have ruled on this issue, to treat calls to ISPs under the reciprocal compensation provisions of their interconnection agreements.[8] Unfortunately, rather than settling any controversy, the FCC's conclusion has simply provided additional "grist for the mill" and inspired ILECs to address anew the issue of whether existing or future interconnection agreements require reciprocal compensation for the termination of calls to ISPs.

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[7] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, Declaratory Ruling, slip op. (Rel. Feb. 26, 1999) ("Recip. Comp. Order"). Appeals have been filed in the U.S. Court of Appeals for the D.C. Circuit by U S West, Bell Atlantic, GTE and MCI WorldCom.

[8] *Id.* at ¶ 24.

II. The NPRM

In the NPRM, the FCC tentatively concludes that reciprocal compensation arrangements should remain within the realm of the overall interconnection negotiations between carriers.[9] Thus, the inter-carrier compensation arrangements would continue to be governed, as a matter of federal law, by sections 251 and 252 of the Telecommunications Act. Parties would negotiate reciprocal compensation issues 17

and submit them for approval and/or arbitration by state commissions.[10] In essence, the FCC is proposing, as a matter of federal law, that the inter-carrier compensation rate be dealt with in the same manner as are other interconnection agreement related issues.

In the alternative, the FCC seeks comment on whether it should adopt a set of federal rules governing inter-carrier compensation for calls to ISPs. Under this approach, parties would negotiate rates, terms and conditions for inter-carrier compensation but not as part of the interconnection negotiations pursuant to sections 251 and 252 of the Telecommunications Act.[11] The FCC also explores whether it should establish special procedures for it to resolve disputes concerning inter-carrier compensation, such as FCC arbitration proceedings.[12] As part of the adoption of federal rules, the FCC requests comment on whether it is possible to measure the

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[9] *Id.* at ¶ 29.

[10] *Id.* at ¶ 30.

[11] *Id.* at ¶ 31.

[12] *Id.* at ¶¶ 31-34.

jurisdictional nature of Internet traffic and have parallel rules -- one for intrastate Internet traffic and another for interstate Internet traffic.[13]

III. Sufficient Legal and Policy Grounds Exist for the FCC to Regulate Inter-Carrier Compensation Rules

Some ILECs already are arguing that CLECs should be denied inter-carrier compensation for ISP-bound traffic.[14] The FCC should reject these proposals. Sound legal and policy considerations strongly favor the continuance of inter-carrier compensation for ISP-bound traffic. As many of the RBOCs suggested in the past, the failure to establish compensation for services provided would raise serious Constitutional issues.

A. The Legal Authority to Promulgate Inter-Carrier Compensation Rules

Little doubt exists that the FCC can adopt regulations for inter-carrier compensation. In *AT&T v. Iowa Utilities Bd.*,[15] the Supreme Court held that Section 201(b) of the Communications Act grants the FCC the authority to carry out the provisions of the Act which includes sections 251 and 252.[16] Since the inter-carrier compensation arrangements between carriers arise out of interconnection arrangements mandated by section 251, the FCC

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13 *Id.* at ¶ 36.

14 *E.g.*, *In the Matter of ACC National Telecom Corp. Blocking Obligations for Chatline Services Case*, Case 98-C-1273, Bell Atlantic-New York Comments on Costs and Rate Structures Applicable to Large Volume Call Termination to Single Customers 6-7 (filed with NY Pub. Serv. Comm'n March 15, 1999).

15 119 S. Ct. 721 (1999).

16 *Id.* at 730.

clearly has the authority to promulgate these regulations.[17] This mandate is broad enough to include any regulations designed "to guide the state-commission judgments."[18] The regulations then would be applied by the states to implement those standards through interconnection agreement approval or arbitration.[19]

This authority is buttressed by the FCC's determination that ISP traffic is interstate in nature. The Constitution and the Communications Act clearly give the FCC the power to regulate interstate communications.[20] Thus, the FCC has the authority to regulate all aspects of interstate communications including any inter-carrier compensation for the provision of that service.

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[17] The FCC's ruling that inter-carrier compensation falls outside the ambit of reciprocal compensation arrangements mandated by section 251(b)(5), *Recip. Comp. Order* at ¶ 26 n.87, does not require a different result. The termination of traffic on different carries' networks arises from the general obligation to interconnect mandated by section 251(a) and the FCC clearly has the authority to regulate the compensation for this traffic. The *Recip. Comp. Order's* effect simply means that inter-carrier compensation on a going forward basis will not be provided under the compensation provisions for terminating local traffic. *Id.* at ¶ 24 n.77.

[18] 119 S. Ct. at 733.

[19] *Id.* at 732.

[20] *See, e.g., Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368-70 (1986); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 167 (1968).

B. Sound Telecommunications Policy Favors Inter-Carrier Compensation

The FCC prohibits carriers from charging ISPs access charges and authorizes them to purchase services at basic intrastate business rates.[21] Yet, local carriers incur a cost when delivering traffic to an ISP that originates on another carrier's local network.[22] If the FCC accepts the arguments of ILECs that they should not be required to pay inter-carrier compensation, then some local carriers will be absorbing costs without being able to obtain remuneration from the party that imposes the cost -- the local carriers' customers that are terminating the ISP-bound traffic on another local carrier's network. The result violates a long-standing principle of telecommunications law, that, to the extent possible, costs should be recovered in the same way they are incurred, i.e., consistent with the principle of cost causation.[23] In the case of ISP-bound traffic, the cost-causer agent would not be paying for the costs that they impose on other carrier networks if inter-carrier compensation for ISP traffic was eliminated.

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[21] This exemption was upheld by the Eighth Circuit. *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 542-43 (8th Cir. 1998). The court found that the FCC adequately explained the rationale for granting ISPs the exemption from access charges.

[22] NPRM at ¶ 29.

[23] *E.g.*, *Access Charge Reform for Incumbent Local Exchange Carriers Subject to Rate of Return Regulation*, CC Docket No. 98-77, 13 FCC Rcd 14,238, 14,243 (1998); *Telephone Number Portability*, CC Docket No. 95-116, 13 FCC Rcd 11,701, 11,726 & n.149 (1998). The concept of cost causation has been accepted by the courts. *E.g.*, *MCI Telecom. Corp. v. FCC*, 675 F.2d 408, 410 (D.C. Cir. 1982).

C. Inter-Carrier Compensation Promotes the Growth of the Internet

In addition to satisfying basic regulatory principles, inter-carrier compensation has served and will continue to serve the public interest. One of the basic statutory objectives of the Telecommunications Act is to promote the development of the Internet.[24] Current inter-carrier compensation arrangements have fostered the growth of Internet services and enabled ILECs and CLECs to meet the increasing needs of consumers and businesses seeking access to the Internet in a cost-efficient and economical manner. ILECs have been reluctant to provide the necessary capacity and trunks to handle the call volumes to ISPs. In contrast, CLECs have invested in their networks to meet the needs of ISPs and consumers seeking access to the Internet. These investments may be curtailed if the CLEC were to incur uncompensated costs in serving ISPs.

The rapid growth of the ISP industry and the concomitant accessibility of the Internet has created demand for greater bandwidth from consumers. As a result, CLECs, ISPs, cable operators and ILECs have more rapidly introduced digital subscriber line and cable modem services to address this growing demand. And, of course, competition to provide these services has driven down the price for these higher bandwidth services making them more affordable to the typical consumer.

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[24] 47 U.S.C. § 230(b).

IV. The Pricing Regime Should Take Into Account High Transaction Costs on Carriers Seeking Compensation for Terminating Traffic of Interconnecting Carriers

In the NPRM, the FCC tentatively concludes that inter-carrier compensation should be addressed as part of the existing interconnection negotiation process on the premise that the procedure reaches an appropriate market-based result between parties of equal bargaining strength in arms'-length negotiations and, given such, that the "economic characteristics of ISP traffic are likely to make voluntary agreements among the parties easier to reach."[25] GST agrees that there is little discernable benefit and obvious increased costs and delays resulting from any effort to establish a separate federal set of negotiations and proceedings to price the same elements. As the experience under the Act has demonstrated, the Act works effectively when the FCC provides guidance and the states hold proceedings and set rates in accordance with such guidance. Little would be gained by establishing a parallel but separate federal procedure which would apply only to inter-carrier compensation for calls to ISPs.

While GST supports the notion that all parties should be permitted initially to negotiate inter-carrier rates, the FCC should recognize that its premise that such negotiations reach an appropriate market-based result simply does not reflect the reality faced by CLECs, particularly smaller CLECs like GST with limited legal and regulatory resources. Nor does it reflect the recent actions of ILECs in light of the FCC's *Recip. Comp. Order*. Since release of the Order, it has been GST's experience that ILECs are, in fact, less willing to enter into

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[25] NPRM at ¶ 29.

mutually satisfactory voluntary agreements with one major ILEC simply taking the position that they do not intend to pay inter-carrier compensation for ISP-bound traffic. Moreover, since the Order, ILECs have returned to most of the states that had decided this issue and are seeking to have those rulings reversed. This, of course, despite the Commission's determination that its ruling should not be "construed to question any determination a state commission has made, or may make in the future [regarding reciprocal compensation for ISP-bound traffic]."

Unfortunately, the parties are obviously by no means equal in bargaining strength. As the FCC noted "incumbent LECs have strong incentives to resist such obligations [to provide access]."[26] This gives the ILEC substantial bargaining power. This bargaining position is enhanced by a substantial inequality in resources because the ILECs have access to substantial legal and regulatory resources the costs of which are recovered materially from a large captive customer base. Moreover, the transactions costs absorbed by CLECs include state commission enforcement of interconnection agreements which often involve expensive and slow adjudicatory hearings.[27] Finally, most CLECs are trying to enter multiple markets at the same time thus requiring that it negotiate contracts in multiple jurisdictions (sometimes with more than one

[26] *Local Competition Order* at ¶ 55, 11 FCC Rcd at 15,528.

[27] *E.g., MCIMetro Access Transmission, Inc. v. U S WEST Communications, Inc.*, Docket No. UT-971063, Commission Decision (Washington Utilities and Transportation Comm'n Rel. Feb. 10, 1999). This complaint seeking enforcement of the interconnection agreement between the two entities was originally filed on June 26, 1997. To the credit of the Washington Utilities and Transportation Commission, it has since enacted abbreviated procedures to resolve disputes concerning interconnection agreements.

ILEC) and then possibly participate, simultaneously in multiple arbitration proceedings. In sum, ILECs have the resources and economic incentive to impose substantial transaction costs on CLECs thereby raising costs. In addition, the length of these procedures results in delayed entry into the market.

The FCC must provide specific guidelines for establishing inter-carrier compensation to impose some limit on the range of issues ILECs can raise and as a way to begin to equalize bargaining power. The FCC already has taken the position that "negotiations will be expedited by the promulgation of national rules."[28] The FCC also noted that arbitrations will "be expedited and simplified by a clear statement of terms that must be included in every arbitrated agreement."[29] And, the FCC understood that national rules "will reduce the need for competitors to revisit the same issue in 51 different jurisdictions, thereby reducing administrative burdens and litigation for new entrants,"[30] or that for smaller carriers entering or competing in multiple markets, "national rules will reduce delay and lower transactions costs, which impose particular hardships for small entities that are likely to have less of a financial cushion than larger

[28] *Local Competition Order* ¶ 56, 11 FCC Rcd at 15,528.

[29] *Id.*

[30] *Id.*

entities."[31] GST agrees. National rules will lower competitor costs of entry, providing service, and can "create economies of scale for entry into multiple markets."[32]

Although the FCC was speaking of interconnection agreements in general, GST's own experience with current reciprocal compensation arrangements demonstrates that the FCC's findings apply with equal, if not, greater vigor to inter-carrier compensation. National rules governing inter-carrier compensation are required and will provide ILECs and CLECs with the necessary standards to avoid undue delay in crafting interconnection agreements, avoid disputes during arbitration over inter-carrier compensation, eliminate the likelihood that ILECs will adopt intransigent positions, and reduce the need for litigation after the agreements take effect. Finally, should the FCC adopt a regime requiring state approval of inter-carrier compensation arrangements, federal pricing rules will be given substantial weight in federal court challenges to state commission decisions.[33]

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31 *Id.* at ¶ 61, 11 Fcd Rcd 15,531.

32 *Id.*

33 It is a fundamental principle of administrative law that federal courts give substantial deference to agency regulatory pronouncements and are required to adopt reasonable federal agency interpretations of ambiguous statutory language. *See, e.g.*, *ABF Freight System, Inc. v. NLRB*, 510 U.S. 317, 324 (1994); *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 844 (1984); *National Latino Media Coalition v. FCC*, 816 F.2d 785, 788 (D.C. Cir. 1987).

V. The FCC Should Adopt Federal Pricing Guidelines Modeled After TELRIC Pricing Rules for Unbundled Network Elements

The Supreme Court stated that the FCC's "prescription, through rulemaking of a requisite pricing methodology"[34] will enable state regulators to "apply those standards and implement that methodology, determining the concrete result in particular circumstances."[35] For the reasons already outlined in these comments, GST strongly urges the FCC to take the Court's imprecation and develop pricing rules for inter-carrier compensation. Since the functionality being compensated -- transport and termination of calls -- is the same regardless of the jurisdiction, the rules promulgated by the FCC and implemented in the last two and a half years by the states should be largely applicable.

In considering the adoption of inter-carrier compensation rates, the FCC should be guided by the same principles that resulted in the adoption of its recently revived interconnection rules. Thus, the pricing of inter-carrier compensation must be based on TELRIC principles irrespective of whether the cost structures are negotiated by the parties or imposed by an outside authority. Because the fundamental purpose of the Telecommunications Act and the FCC's "hands-off" approach to Internet regulation is to foster a competitive market, proper pricing signals are needed to ensure the most economically efficient allocation of resources among ILECs, CLECs, and ISPs. The FCC has determined that TELRIC mirrors the prices that would

[34] *AT&T v. Iowa Utils. Bd.*, 119 S. Ct. at 732.

[35] *Id.*

be reached by telecommunications providers operating in a competitive market and therefore provides the best pricing signals to the market for unbundled network elements.[36] TELRIC pricing of inter-carrier compensation will fulfill the identical function for the termination of ISP-bound traffic.

The use of TELRIC pricing has the added substantial advantage of being in place in most states. The FCC rules should provide that state-approved TELRIC rates for transport and termination of local calls should apply as well to inter-carrier compensation for calls to ISPs. Since there is no difference in the functionality, there is no reason to establish separate or different rates. Any party could challenge the TELRIC rate for all traffic, but the state-approved TELRIC rate would be applied in the interim.

This pricing structure would be based on the costs that the ILECs incur in transporting and terminating "local" traffic -- information that for the most part has already been submitted, reviewed and used to set reciprocal compensation rates by most state commissions.[37] No data exists which demonstrates that CLECs costs for terminating traffic are substantially lower than those of the ILEC. Indeed, over any reasonable forward-looking period that would be recognized by a TELRIC analysis, a CLEC's variable costs are likely to be higher than an

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[36] *Local Competition Order* at ¶ 672, 11 FCC Rcd at 15,844.

[37] In contrast, CLECs have neither the regulatory nor legal resources to participate in extensive rate case proceedings in an effort to determine their costs of termination. This simply would divert scarce resources without any concomitant gain to ISP customers.

ILEC's costs – reflecting the necessity of amortization, the CLEC's start-up costs and the risks inherent with entry in a capital intensive market.

Adoption of the ILEC termination costs also eliminates the argument that the rate structure is unfairly biased toward the CLEC.[38] The rules also should adopt termination charges on a minutes-of-use basis as that is the method used to compensate most traffic and is the basis for all existing reciprocal compensation arrangements. In fact, minutes-of-use pricing is used for all services utilizing the switched network including switched access and local usage-based services. There is no sound basis for distinguishing these calls from any other calls.

Nor is there any evidence that the characteristics of Internet calls, such as longer holding times, significantly affect the average per minute costs of these calls compared to the substantial volume of traffic that already transverses ILEC and CLEC networks. It is true that Internet calls are growing rapidly, but telephone networks in the United States already handle well over three trillion minutes of use annually. The rapid development of ADSL and other high speed access services will act to moderate the economic effects of Internet calls on existing switched networks over time. To the extent that the ILECs believe that their termination rates are too high and will result in excessive payments to CLECs, these rates would have the added benefit of providing an incentive for the ILECs to operate more efficiently in terminating both Internet and other types of calls thereby benefitting all consumers.

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[38] In fact, given the size of the networks and CLEC reliance on ILEC services, including collocation and unbundled network elements, it is likely that the CLECs may have higher termination costs.

Finally, requiring any type of compensation arrangement other than current minutes-of-use charges would require CLECs to undertake costly and highly inefficient network engineering, in order to segregate the Internet traffic so that a separate compensation system could be applied to such calls. GST earlier noted that CLECs have made large additions to their networks in order to prevent blockage of large numbers of Internet calls, in the absence of ILECs' ability or willingness to provision such capacity. Those gains would be reversed or even eliminated if the Internet calls had to be segregated merely in order to apply special pricing rules. Thus, all of the major economic policy issues affecting this traffic would be undercut if special prices were adopted.

A. Default Proxies

Just as the FCC permits ISPs to utilize intrastate services and not pay access charges, it should exercise its interstate jurisdiction over inter-carrier rates by utilizing the work already done by the states and use the state-determined TELRIC rates. In the event a state has not established a TELRIC rate for the transport and termination of local traffic, the FCC's rules should provide for the use of the FCC's previously established proxy rate. This approach also would expedite resolution of inter-carrier compensation rate negotiations. Knowing the default regime would ensure that the parties do not purposely negotiate to an impasse over inter-carrier compensation with the expectation that each party would gain the most through dispute resolution. A default compensation mechanism also would accelerate the resolution of any dispute because the parties would be unable to litigate the appropriate pricing mechanism. The

Commission should provide that where a contract rate is in effect that it may remain in effect until rates are set based on TELRIC.

VI. The FCC Must Establish a Nationally Applicable Dispute Resolution Mechanism to Resolve Inter-Carrier Compensation Complaints

Stringent federal inter-carrier compensation rules should eliminate many of the problems CLECs, including GST, have experienced in negotiating interconnection agreements. However, GST expects that ILECs will continue to be intransigent in meeting their obligations to pay CLECs for terminating ISP-bound traffic. CLECs then will institute appropriate enforcement actions seeking monies duly owed them. GST is concerned that ILECs have both the resources and the economic incentive to make such proceedings interminable. And unlike the FCC's "Rocket Docket,"[39] most states do not have special procedures to expeditiously resolve general interconnection disputes, much less those related to payments due and owing a carrier.[40]

GST believes that the FCC has two options to ensure that inter-carrier compensation disputes that arise after an agreement has been reached are quickly and efficiently

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[39] *In the Matter of Implementation of the Telecommunications Act of 1996: Amendment of the Rules Governing Procedures to be Followed When Formal Complaints are Filed Against Common Carriers*, CC Docket No. 96-238, Second Report and Order, 13 FCC Rcd 17,018 (1998) ("Rocket Docket Order").

[40] The Washington Utilities and Transportation Commission, much to its credit, recognized the value of special accelerated procedures for resolving interconnection disputes. *Petition for Enforcement of Interconnection Agreements*, Docket No. A-970591, (Rel. Oct. 23, 1998).

resolved. Since the traffic has been declared interstate in nature, the FCC has jurisdiction to resolve these disputes and require that they be resolved in the rocket docket. In fact, these disputes would be ideal for resolving in the rocket docket since the complaint would involve very narrow and discrete issues based upon the existing text of the interconnection agreements.[41] In the alternative, the FCC could simply leave this issue to the states to enforce, just as the states are the prime arbiter of all other interconnection agreement disputes. Should the FCC take the latter approach, GST strongly urges the FCC to mandate that states must resolve these inter-carrier compensation disputes within sixty days; otherwise the FCC will assert jurisdiction. This process is not significantly different than the mandate that states act on interconnection arbitrations within a set period or the FCC will displace the state commission. The FCC also uses a separate procedure requiring that states have 20 days to offer its advice on whether a Bell Operating Company has complied with competitive checklist in section 271. GST believes that the FCC-imposed mandate to act quickly will not burden state commissions for the same reasons that they would be ideal for resolution in the rocket docket process.

[41] The FCC noted that the rocket docket should only include those issues that may be effectively litigated under the time constraints of that procedure and generally would not include issues related to both liability and damages. *Rocket Docket Order* at ¶ 19. If a federal rule mandating inter-carrier compensation existed and traffic studies were exchanged, the only issue in an inter-carrier compensation dispute would be liability -- an ideal application of the rocket docket procedures.

VII. The FCC Must Clarify the Use of "Pick and Choose" and "Most-Favored Nation" Clauses for Inter-Carrier Compensation Agreements

Section 252(i) of the Telecommunications Act requires a local exchange carrier to "make available any interconnection, service, or network element provided under an agreement approved under [section 252] to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement."[42] Out of that statutory mandate, the FCC determined that carriers should be permitted to pick and choose among individual provisions of various interconnection agreements in order to prevent an ILEC from loading an agreement with onerous provisions, not needed by the other signatory, but useful in dissuading other carriers from selecting that entire agreement.[43] The "pick and choose" rule enables a CLEC to select an inter-carrier compensation arrangement from existing interconnection agreements. If the FCC adopts its tentative conclusion that inter-carrier compensation should be negotiated as part of the section 252 interconnection agreement process, then the FCC must make clear that the "pick and choose" rule applies with equal vigor to inter-carrier compensation arrangements.

If the FCC did not make this clear, GST suspects that some ILECs would seize on the *Recip. Comp. Order* to argue that inter-carrier compensation agreements should not be

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[42] 47 U.S.C. § 252(i).

[43] *Local Competition Order* at ¶ 1312, 11 FCC Rcd at 16,138. The Eighth Circuit vacated the FCC's pick and choose rule. The Supreme Court in reversing the Eighth Circuit did not remand the issue to Eighth Circuit but simply ordered that the "pick and choose" rule be reinstated. *AT&T v. Iowa Utils. Bd.*, 119 S. Ct. at 738.

subject to the "pick and choose" rule because such agreements do not arise out of the interconnection agreement process and thus section 252(i) does not apply. GST believes that this reasoning is fallacious for a number of reasons. First, as already noted the inter-carrier compensation derives, not from section 251(b)(5) but from the more general requirement in section 251(a) to interconnect with other carriers. Second, nothing in the Telecommunications Act requires parties negotiating interconnection agreements to limit themselves to the provisions of section 251, as the FCC makes clear.[44] Yet, these agreements also must be approved by state commissions.[45] Therefore, the "pick and choose" rule should be available and the FCC would eliminate potential ILEC arguments by simply declaring so in its inter-carrier compensation rules.

Application of the "pick and choose" rule requires the FCC to address another issue – the use of "most-favored nation" ("MFN") clauses in inter-carrier compensation agreements. Many interconnection agreements contain MFN clauses that allow parties to select various provisions from other parties' interconnection agreement with a particular carrier, be it CLEC or ILEC.[46] The FCC has determined that all parties with interconnection agreements are entitled to MFN-clause status whether a MFN clause is in that party's interconnection agreement

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[44] *See Recip. Comp. Order* at ¶ 24 n.77.

[45] 47 U.S.C. § 252(e)(1).

[46] NPRM at ¶ 35.

or not.[47] This allows any carrier to avail itself of the most favorable terms and conditions previously or subsequently negotiated by another carrier. Essentially, the combination of the "pick and choose" rule and the MFN process enables later new entrants to opt in to agreements or portions thereof, including reciprocal compensation arrangements negotiated between an ILEC and previous carrier or subsequently negotiated by an ILEC and another carrier.

As with the "pick and choose" rule and for the same reasons, the FCC must make clear that MFN and the capability to opt in apply to inter-carrier compensation arrangements. Carriers exercising their opt-in rights to inter-carrier compensation arrangements would not be permitted to obtain the inter-carrier arrangement for the length of the opted-in contract.[48] The FCC could limit the term to the opting-in carrier's term for its interconnection agreement, i.e., if the opting-in carrier had eight months remaining on its interconnection agreement, then the inter-carrier compensation arrangements would last for eight months. Finally, the FCC should clarify that a party seeking to exercise a MFN or its opt-in rights under the *Local Competition Order*

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[47] *Local Competition Order* at ¶ 1316, 11 FCC Rcd at 16,139-40.

[48] The FCC has made it clear that that a party utilizing "pick and choose" cannot mix and match different terms and conditions to create new arrangements. *Id.* at ¶ 1314, 11 FCC Rcd at 16,139. For example, if the rate for switching was $.003 cents per minute but the rate for interoffice transport was $.002 cents per minute, the FCC would not permit a subsequent carrier to obtain interoffice transport at the switching price. Generally, existing interconnection agreements do not specify term limits for reciprocal compensation and, under normal contractual interpretation, the general provision concerning the length of the contract applies. If a subsequent carrier opts in to an existing contract that is about to expire, the opting-in carrier gets the benefit of the reciprocal compensation for the entire term of the underlying interconnection agreement. NPRM at ¶ 35.

need not have to go through a formal arbitration or otherwise undertake costly regulatory procedures to obtain approval of the opt-in inter-carrier compensation arrangement. The FCC should order that opt-in provisions will take effect within 30 days of the request to opt in unless either party can demonstrate that special circumstances require a different time period.

VIII. The FCC Should not Require Jurisdictional Identification of ISP-Bound Traffic

The FCC points out that an interstate circuit-switched telephone call is one that originates in one state and terminates in another or in a foreign country.[49] Making the determination where a call bound for the Internet, a packet-switched network, and transiting through an ISP is much more complicated. In a single Internet session, a user may communicate with multiple destinations either sequentially or simultaneously. Websites may be located in the same state, in different states, or in foreign countries. Further complicating matters is the fact that popular websites are cached on multiple servers throughout the Internet thus making it even more difficult to ascertain where a "call" terminates. The caching of sites is not based on state boundaries but the operational practices and demands placed on ISPs, particularly large national ISPs, such America Online, Earthlink, and Mindspring. Finally, peering arrangements for the Internet may result in a website with a foreign country address actually residing in a computer in some other geographic location including one in the same state as the user. Despite these apparent difficulties in determining a termination point, the FCC requests comments on whether

[49] *Recip. Comp. Order* at ¶ 18.

it should mandate separations into interstate and intrastate jurisdictions as it has done so for circuit-switched networks.[50]

GST does not believe that different pricing arrangements are appropriate or feasible for inter-carrier calls based on jurisdiction. There is no current method of determining the end point or the actual location of the websites being accessed by a dial-up ISP customer at a point in time or for the duration of an ISP-bound calls. Any attempt to do so at this time would be costly and inefficient and probably futile. While at least one carrier claims that it can actually measure whether Internet traffic is intrastate or interstate,[51] GST has seen no evidence that such a system works or works on an economical basis. Even if the jurisdictional nature of such traffic was measurable, it would not serve any purpose. The FCC already has determined that such traffic is interstate in nature[52] and no purpose would be served by establishing a costly

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[50] NPRM at ¶ 36.

[51] *Pacific Telephone Company, Pacific Bell Tariff FCC No. 128, Pacific Bell Transmittal No. 1986*, CC Docket No. 98-103, Direct Case of Pacific Bell, Attachment B at 4-5 (Filed Sept. 11, 1998) (stating that SBC developed means to measure jurisdictional nature of Internet usage). Pacific Bell, however, never filed any data demonstrating its capability to measure the jurisdictional nature of such traffic and the FCC never requested it. Yet, the FCC was able to determine that DSL service should be tariffed at the Federal level. *In the Matter of GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148*, CC Docket No. 98-79, Memorandum Opinion and Order, slip op. at ¶ 1 (Rel. Oct. 30, 1998).

[52] This conclusion is supported by the FCC's 10 percent rule wherein traffic that contains at least ten percent interstate traffic and cannot be efficiently separated into intrastate and interstate traffic is considered interstate traffic for jurisdictional purposes. *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11,501, 11,555 (1998). GST sees no reason to depart from this rule as long as the FCC maintains that the jurisdictional nature of an Internet "call" is measured on an end-to-end

(continued...)

separations procedure. More significantly, there is no evidence in this or any other proceeding that the costs for terminating traffic on a CLEC or ILEC network varies based on whether the traffic is interstate or intrastate. Termination uses the same lines and facilities whether a call is bound for an ISP across the street or in another state. ISP-bound traffic should not be saddled, without good economic cause, with an ineffective, uneconomic separations procedure. Therefore, the FCC should treat interstate and intrastate "inter-carrier compensation" in the same manner.

IX. Conclusion

The NPRM has given the FCC the opportunity to resolve a number of longstanding difficult issues plaguing the relationships between ILECs and CLECs with respect to inter-carrier compensation for ISP-bound traffic. The FCC should seize the moment and promulgate rules and standards that would eliminate burdensome and unnecessary transaction costs resulting from the negotiation and resolution of inter-carrier compensation arrangements. The Commission should extend its TELRIC principles to establish rates for this functionality. This will allow the FCC to utilize state TELRIC efforts accomplished to date. The ultimate beneficiaries of this process will be Internet users because carriers will be able to devote their human and financial resources to providing innovative new mechanisms for accessing the

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[52](...continued)
basis and does not terminate at the ISP. A position with which GST disagrees. Nor did the FCC have an adequate basis to support its conclusion that 10% of ISP traffic is jurisdictionally interstate.

Internet rather than hiring lawyers to adjudicate disputes in various federal and state forums throughout the country pertaining to compensation matters.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Celia Petrowsky, hereby certify that on this 12th day of April 1999, copies of the foregoing Comments of GST Telecom Inc. on the Notice of Proposed Rulemaking were delivered by hand and first class mail to the following:

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